INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	4
Argument	5
Conclusion	11

CITATIONS

Cases:	
Beland v. *United States*, 117 F. (2d) 958, certiorari denied, 313 U. S. 585	4
Graham v. *West Virginia*, 224 U. S. 616	7, 8
Gutierrez, Ex parte, 45 Cal. 429 (1873)	8
McDonald v. *Massachusetts*, 180 U. S. 311	7. 8
Moore v. *Missouri*, 159 U. S. 673	7, 8
Rand v. *Commonwealth*, 9 Grattan (50 Va.) 738 (1852)	8
Ross's Case, 2 Pick. (19 Mass.) 165 (1824)	8
Skinner v. *Oklahoma*, No. 782, October Term, 1941, decided June 1, 1942	9, 10
Statutes:	
Act of August 12, 1937, c. 598, 50 Stat. 627 (Internal Revenue Code, Title 26, U. S. C. §2557 (b) (6) and (7)):	
Section 2	2, 6
Section 3	3
Internal Revenue Code, 53 Stat., Part 1, p. 1	7
National Prohibition Act of October 28, 1919, Sec. 29, c. 85, Title II, §29, 41 Stat. 316, repealed by Section 1 of the Liquor Law Repeal and Enforcement Act of August 27, 1935, c. 740, Title I, 49 Stat. 872	9
Miscellaneous:	
H. Rep. No. 1122, 75th Cong., 1st sess., pp. 2–3	9

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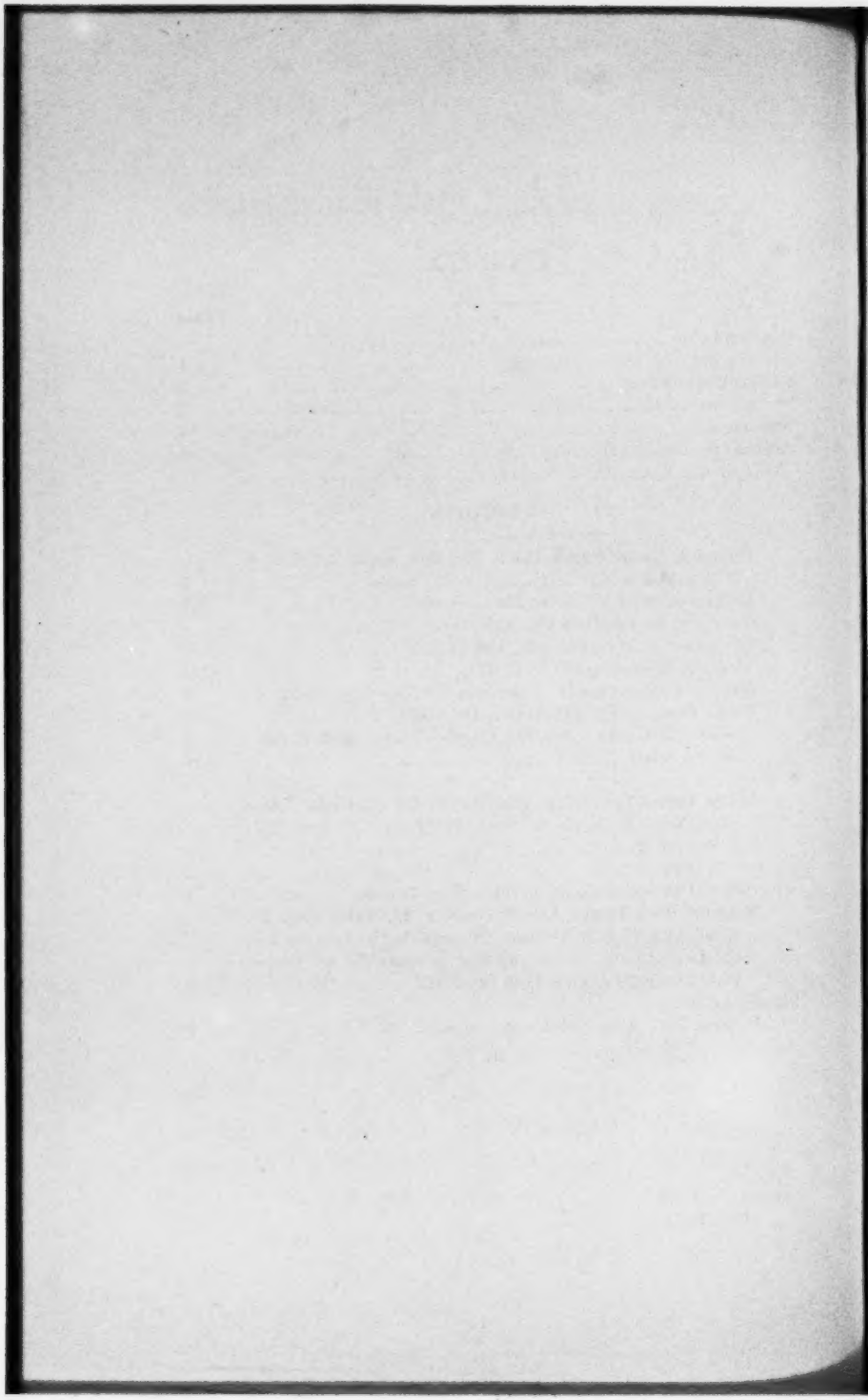

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 416

CHARLES BELAND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 36–39) is reported at 128 F. (2d) 795.

JURISDICTION

The judgment of the circuit court of appeals was entered June 11, 1942 (R. 40), and a petition for rehearing (R. 41–57) was denied August 27, 1942 (R. 58). The petition for a writ of certiorari was filed September 24, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules, promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the district court's action in imposing a seven-year sentence, pursuant to Section 2 of the Act of August 12, 1937, violated the mandate of the circuit court of appeals in remanding the cause for the purpose of resentencing petitioner.

2. Whether Section 2 of the Act of August 12, 1937, providing a more severe punishment for a person convicted for a third time of violating the federal narcotic laws, operates as an *ex post facto* law when applied to one whose two prior convictions occurred before the enactment of the statute.

3. Whether the statute is unconstitutional because of the fact that it applies only to habitual offenders against the narcotic laws.

STATUTE INVOLVED

Sections 2 and 3 of the Act of August 12, 1937, c. 598, 50 Stat. 627 (Internal Revenue Code, Title 26, U. S. C., § 2557 (b) (6) and (7)) provide:

> SEC. 2. A person who, after having been two times convicted of selling, importing, or exporting, or conspiring to sell, import, or export, opium, coca leaves, cocaine, or any salt, derivative, or preparation of opium, coca leaves, or cocaine, again sells, imports, or exports or conspires to sell, import, or export, any of the said narcotic drugs, in violation of the laws of the United States, shall, upon conviction of such third offense, or any offense subsequent thereto, be fined not more than $10,000 or imprisoned in a

Federal penitentiary for not more than twenty years, or both, in the discretion of the court, whenever the fact of such previous convictions is established in the manner prescribed in section 3 of this Act.

SEC. 3. Whenever it shall appear, after conviction and before or after sentence, that a person convicted of unlawfully selling, importing, or exporting, or conspiring unlawfully to sell, import, or export, any of the narcotic drugs enumerated in this Act has previously been convicted of unlawfully selling, importing, or exporting, or conspiring unlawfully to sell, import, or export, any of said narcotic drugs, in violation of the laws of the United States, it shall be the duty of the United States district attorney for the district in which such subsequent conviction was had to file an information alleging that the defendant has previously been so convicted, and further alleging the number of such previous convictions. The court in which the defendant was convicted shall cause the said defendant, whether confined in prison or otherwise, to appear before it and shall apprise him of the allegations of the information and of his right to a trial by jury as to the truth thereof. The court shall inquire of the defendant whether he is the person who has previously been convicted. If the defendant states he is not such person, or if he refuses to answer or remains silent, a plea of not guilty shall be entered by the court, and a jury shall be

empaneled to determine whether the defendant is the person alleged in the information to have previously been convicted, and the number of such previous convictions. If after a trial on the sole issue of the truth of such allegations the jury determines that the defendant is in fact the person previously convicted as charged in the information, or if he acknowledges in open court, after being duly cautioned as to his rights, that he is such person, he shall be punished as prescribed in sections 1 or 2 of this Act, as the case may be, and the previous sentence of the court, if any, shall be vacated and there shall be deducted from the new sentence the amount of time actually served under the sentence so vacated.

STATEMENT

On May 14, 1940, an indictment was returned in the District Court for the Northern District of Texas charging petitioner and others, in 41 counts, with substantive offenses against the narcotic laws of the United States and, in the forty-second count, with conspiracy to violate such laws (R. 1–15, 16). Petitioner was found guilty on counts 16, 18, and 42 and received a general sentence of five years' imprisonment on counts 16 and 42 and a ten-year suspended sentence on count 18 (R. 16). On appeal, the court below affirmed the conviction on count 42, the conspiracy count, but reversed the judgment as to counts 16 and 18 (R. 16–17, 22–23; see *Beland* v. *United States,* 117 F. (2d) 958,

certiorari denied, 313 U. S. 585), and remanded the cause to the district court "with direction to resentence him [petitioner] accordingly" (R. 23).[1]

On November 10, 1941, prior to the imposition of sentence in accordance with the mandate of the circuit court of appeals, the United States Attorney filed an information in the district court, pursuant to the provisions of Section 3 of the Act of August 12, 1937 (*supra*, p. 3), alleging that petitioner had been convicted in the same district in 1926 and again in 1935 of selling morphine, a derivative of opium, in violation of the narcotic laws of the United States (R. 17, 18–22). On November 11, 1941, after having been fully apprised of these allegations and of his right to a jury trial as to the truth thereof, petitioner acknowledged in open court that he was the person who had been twice previously convicted as alleged in the information (R. 25). The court thereupon sentenced petitioner to seven years' imprisonment (R. 26), and on appeal the judgment was affirmed (R. 40).

ARGUMENT

1. Petitioner's contention (Pet. 6; Br. 5, 9–11) that the action of the district court in imposing a seven-year sentence violated the mandate of the circuit court of appeals is without merit. The sentence was less than the maximum allowed by

[1] The circuit court of appeals held that the convictions on the substantive counts—16 and 18—were not supported by the evidence (117 F. (2d), at 959).

Section 2 of the Act of August 12, 1937 (*supra*, pp. 2–3), which, under the facts alleged in the information and admitted by petitioner, was applicable. And, as pointed out by the court below, no opinion was expressed by it on the previous appeal as to the length of sentence to be imposed by the district court; hence, all that was required under the mandate was that petitioner be resentenced "in accordance with the Constitution and laws of the United States" (R. 38; see also R. 23.) [2]

2. Petitioner argues, however (Pet. 7; Br. 6, 14–15), that Section 2 of the Act of August 12, 1937, if construed to apply to a third conviction under the narcotic laws where the prior convictions occurred before the passage of the act, is an *ex post facto* law and hence violative of Article I, Section 9, clause 3 of the Constitution.[3] This contention is likewise without merit. The constitutionality of statutes imposing heavier penalties

[2] The fact that petitioner's contention did not impress the very court whose mandate is alleged to have been violated (see R. 37–38) would seem to render any further discussion of the point superfluous.

[3] Petitioner suggests (Br. 16) that Congress may have intended the act to apply only where the prior convictions occurred subsequent to the passage of the act. The suggestion, however, is based largely on the contention, which we here show to be untenable, that, unless the act is thus construed, it is *ex post facto* in nature. But in any event, the plain and unambiguous language of the act does not admit of the suggested construction.

upon persons who have been previously convicted of crime is settled. *Graham* v. *West Virginia,* 224 U. S. 616[4]; *McDonald* v. *Massachusetts,* 180 U. S. 311; *Moore* v. *Missouri,* 159 U. S. 673. Under such statutes, habitual offenders "are not punished the second time for the earlier offense, but the repetition of criminal conduct aggravates their guilt and justifies heavier penalties when they are again convicted." *Graham* v. *West Virginia, supra,* at 623. And since these statutes impose punishment on "none but future crimes," they are not *ex post facto. McDonald* v. *Massachusetts, supra,* at 313. In the instant case, the third conviction was based upon an offense—the conspiracy charged in count 42 of the indictment—which occurred after the enactment of the statute (see R. 2)[5]; as a consequence of the two prior convictions, Section 2 was in terms applicable and petitioner was subject to

[4] The federal statute here involved is almost identical in its provisions with the West Virginia statute, the constitutionality of which was sustained in the *Graham* case, *supra.*

[5] Petitioner erroneously states (Br. 4, 7, 12), as he did in the court below (see R. 39), that the statute was enacted on February 10, 1939 (the conspiracy was alleged to have been formed on or about November 24, 1937, and to have continued down to May 14, 1940, the date the indictment was filed (R. 2)). However, the statute was in fact approved on August 12, 1937 (50 Stat. 627). The date February 10, 1939, which petitioner cites, is the date of the enactment of the Internal Revenue Code (53 Stat., Part 1, p. 1), which incorporated the provisions of the Act of August 12, 1937, as Section 2557 (b) (5), (6), and (7) (53 Stat., Part 1, pp. 275–276).

be punished for the third offense in accordance with its provisions. The fact that the earlier convictions occurred prior to the enactment of the statute is wholly immaterial, for, as we have seen, the punishment is for the new crime only, but is heavier because the accused is an habitual offender. *Ross's Case,* 2 Pick. (19 Mass.) 165, 170–171 (1824); *Rand* v. *Commonwealth,* 9 Grattan (50 Va.) 738, 743–745 (1852); *Ex Parte Gutierrez,* 45 Cal. 429, 431–433 (1873).[6]

[6] The contention (Br. 5–6, 7, 11, 12–13) that Section 3, *supra*, in so far as it authorizes the United States Attorney to proceed by way of information, violates the clause of the Fifth Amendment providing that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury" is likewise untenable. As this Court held in the *Graham* case, *supra*, the information does "not allege crime" and the defendant is "not held to answer for an offense" (224 U. S., at 624); "There is no occasion for an indictment", because "the inquiry is not into the commission of an offense; as to this, indictment has already been found and the accused convicted. There remains simply the question as to the fact of previous conviction" (*id.*, at 627). Nor was it necessary, contrary to petitioner's implied assertion (Br. 11–12), that the prior convictions be alleged in the indictment, whether or not they were known at the time. *Graham* v. *West Virginia*, *supra*, at 628–629. Indeed, such a procedure would not have been permissible under the statute, which requires that the fact of the previous convictions be established "after conviction and before or after sentence" (Section 3, *supra*, p. 3). The further contentions that the sentence imposed was a cruel and unusual form of punishment (Pet. 6; Br. 2, 18) and that it was "tantamount to double jeopardy" (Br. 13) are also without merit. *Moore* v. *Missouri*, *supra*, at 677; *McDonald* v. *Massachusetts*, *supra*, at 313; *Graham* v. *West Virginia*, *supra*, at 631.

3. Relying on this Court's decision in *Skinner* v. *Oklahoma*,[7] No. 782, October Term, 1941, decided June 1, 1942, petitioner urges (Br. 17–18) that the statute here involved is unconstitutional because "narcotic law violators are singled out * * * as a special class, and if twice or thrice convicted, special aggravated punishment is imposed in an arbitrary and mandatory fashion" (*id.*, 18).[8] The contention lacks merit, for the *Skinner* case is clearly distinguishable. The Oklahoma habitual criminal sterilization law there involved was held to violate the equal protection clause of the Fourteenth Amendment because of its highly artificial and arbitrary discrimination between different types of habitual criminals. It is clear, however, from the report of the House Judiciary Committee recommending enactment of the statute here involved that there was a special and urgent need for legislation increasing the punishment of habitual violators of the narcotic laws. H. Rep. No. 1122, 75th Cong., 1st sess., pp.

[7] The texts of the majority and the two concurring opinions are copied in the petition for a rehearing filed in the court below (R. 43–56).

[8] This statute is not the first providing for increased punishment of habitual offenders against specific federal laws. Cf. Section 29 of the National Prohibition Act of October 28, 1919, c. 85, Title II, 41 Stat. 316, repealed by Section 1 of the Liquor Law Repeal and Enforcement Act of August 27, 1935, c. 740, Title I, 49 Stat. 872. The repealed section provided for increased penalties for second or subsequent offenses against the liquor laws. So far as we have been able to determine, the constitutionality of this section was never questioned. See annotations under 27 U. S. C. A. 46.

2–3.[9] There is, of course, no constitutional mandate compelling Congress, in enacting penal legislation, "to ignore experience which marks a class of offenders or a family of offenses for special treatment." *Skinner* v. *Oklahoma, supra* (R. 49).[10]

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[9] The necessity for the legislation is shown by the following excerpts from the committee's report:

"Studies of the problem of narcotic control made by the Treasury Department indicate the need for this legislation. Those studies show that a large percentage of persons convicted for narcotic violations are habitual offenders. * * *

"The studies by the Treasury Department further indicate that narcotic offenders as a group are responsible for a large number of criminal offenses of every nature and have a high percentage of previous convictions for other crimes as well as those involving narcotics. * * *

"It is evident from the above facts that the habitual violator of the narcotic laws presents a very serious problem in the control of crime, and that existing methods of enforcement, so far as they concern the punishment meted out to such violators, has not been sufficiently drastic on the whole to check their activities. The present narcotic laws do not provide for the increase of the punishment of violators by reason of previous convictions. * * *

"It is believed that H. R. 6283, through its provisions for the increase of the punishment of habitual offenders against the narcotic laws, will not only deter the commission of offenses against such laws, but also by removing such offenders from contact with society will prevent the spread of the narcotic habit and reduce materially the number of criminal offenses of other kinds."

[10] Of course, the *Skinner* case is also distinguishable on the ground that the equal protection clause of the Fourteenth Amendment, there held to have been violated, has no counterpart in the Fifth Amendment, or any other constitutional provision limiting congressional action. Moreover, it appears both from the majority opinion (R. 49–51) and from the concurring opinions (R. 52–55, 56) that the devastating

CONCLUSION

The case was correctly decided below, and no conflict of decisions or question of importance is involved. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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nature of the punishment imposed weighed heavily in this Court's judgment that the statute was not sufficiently meticulous in avoiding discrimination and unwarranted application.

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